

STATE OF VERMONT  
DEPARTMENT OF EDUCATION

Special Education  
Case #DP06-10

Due Process Hearing

**ORDER**

INTRODUCTION

A special education due process hearing request was filed by the parent in this matter on April 10, 2006. A hearing was held on May 14 and 15, 2006 in Castleton, Vermont. The parent was assisted by advocates Brice Palmer and Diane Drake. The school district (hereafter the “district” or “school”) was represented by Attorney Heather Thomas.

ISSUE

The issue in this case is whether the IEPs and placement proposed for the student by the district for the 2005-2006 school year are appropriate.

FINDINGS OF FACT

1. The student is a thirteen year old seventh grader who attended the district’s elementary school until March 7, 2006.
2. As an infant and young child, the student was neglected and abused by his biological parents. (Testimony of parent; Parent’s Exhibit (hereafter “P. Ex.”) 28).
3. At the age of four, the student became the foster child of parents who adopted him almost four years later.(Testimony of parent).
4. As a child, the student had difficulty walking and it was apparent that he was mentally impaired. (Testimony of parent).
5. During his early grade school years, the student exhibited behavior problems, including, the hoarding of food and difficulty remaining in his seat and staying on task and (Testimony of parent).
6. In 2003, Dr. Frank Goodwin did a psychological evaluation of the student which included questionnaires completed by the parents and teachers, a record review, an

observation of and interview with the student. At the time, the student's primary difficulties were attention and self-control. (Testimony of Dr. Frank Goodwin).

7. The student has a full scale IQ of 73 with significant discrepancies between the subtest scores. (P.Ex. 25).

8. The parents believe that the student's disability is not limited to ADHD but also may also include Traumatic Brain Injury, the Autism Spectrum or a Specific Learning Disability. ( Testimony of parent).

9. Based on the Evaluation conducted by the Stern Center, the student's profile does not demonstrate a Specific Learning Disability in a specific skill area. (P. Ex. #20).

10. No evidence of the student being on the Autism Spectrum was presented at the Hearing.

11. The student's therapist, Alice Day-Aparicio, discussed the possibility of the student having Traumatic Brain Injury (hereafter "TBI") but is not qualified to make a diagnosis of TBI. (Testimony of Alice Day-Aparicio).

12. The student functions at a survival level and it will take years of therapy to help him. He doesn't believe that he will be fed which has led to hoarding and stealing. He is impulsive and doesn't understand why he does things. The common thread of his symptoms indicates Post Traumatic Stress Disorder. The behaviors he exhibits are the result of his symptoms. (Testimony of Alice Day-Aparicio).

13. The student has been diagnosed with ADHD and has been found eligible for special education under the category "other health impaired". The ADHD characteristics he exhibits include hyperactivity, inattentiveness, impulsivity and distractibility. The student has difficulty with attachment and may have a Reactive Attachment Disorder. He also exhibits characteristics of Emotional Disturbance such as an inability to maintain relationships and demonstrations of inappropriate behavior under normal circumstances. During the Stern Center evaluation, the student "exhibited significant ADHD characteristics." The student's 2004-2005 IEP identifies his category of disability as Other Health Impaired. His 2006-2007 identifies his disability as Emotional Disturbance. (P.Ex. 20; P.Ex. 18; P.Ex. 19; P.Ex. 31; Testimony of Alice Day-Aparicio).

14. In cognitive assessments over time and across measures, the student generally performs at the low to very low range. These assessments include, the Comprehensive

Test of Nonverbal Intelligence and the WJIII Tests of Achievement (math, reading and written language). Oral language is a relative strength for the student. (P.Ex. 31).

15. The student has a complex combination of social-emotional, learning and attention difficulties. “His learning problems appear to be global, and primarily affected by his emotional and attention weakness.” (P.Ex. 20).

16. While in 6<sup>th</sup> grade, the student was reading at a 2<sup>nd</sup> to 3<sup>rd</sup> grade level. His skill levels are scattered. In the beginning of the year the focus in math was on basic addition and subtraction skills. Later in the year he moved to single digit multiplication and struggled with coins, basic fractions and telling time. His behavior and ability to stay on task were variable. (Testimony of Rebecca Armitage).

17. The student’s 6<sup>th</sup> grade, October 2004 – June 2005 IEP, provided for special education services in a small group for Language Arts, Math, Speech/Language, Occupational Therapy and academic support in Social Studies, Science, Health and Computers. Changes were made in April 2005 to add a small group structured study hall and academic support in Math and Language Arts to his program. The student was to receive Extended School Year services for three weeks, 4 days a week, for 2 hours a day in reading, writing, math and language skills. (P. Ex. 18).

18. In the seventh grade, the student transitioned to the middle school and mainstreaming became easier. During an 80 minute language arts and math block, 50 minutes was spent in the regular classroom and 30 minutes in the Resource Room where he could redo and practice at his instructional level as well as receive pre-teaching and post-teaching. In math, his work included adding and subtracting with like and unlike denominations, reducing fractions, geometry with measurements of angles, statistics of mean and mode, comparing fractions with decimals, reading graphs and basic division algorithms. In reading, the student read all of Milestone 5-3 book at a 3.5 grade level, his words per minutes reading rate increased to 85, he could at times decode at a 7<sup>th</sup> grade level and he completed 2 steps of the Wilson Reading Program. He was more on task than during his previous 6<sup>th</sup> grade year. In the regular classroom, the student was able to participate in the regular education Math class in ways that his special educator, Rebecca Armitage, never expected. (Testimony of Rebecca Armitage).

19. It is difficult to assign grade levels to the student’s basic academic skills

because of the variability in his work from day to day. This is due to his attention difficulties, the variability of his internal turmoil and some splintering of skills, meaning that although he is missing some lower level skills, he can perform some higher level skills. (Testimony of Kris Benway).

20. Although Ms. Armitage is the student's case manager as well as his special educator, his one to one aide, Tracy Hardiman was with him the majority of the time as support in the regular education classes and working with him in the Resource Room. (Testimony of Tracy Hardiman).

21. Between January and March of 2006 while the student and Ms. Armitage were in the Resource Room there was no evidence of him being anxious nor did he appear to react negatively to Ms. Armitage's presence in the room. In fact, he seemed to be more on task and productive with her there. (P.Ex. #22; Testimony of Tim Leslie).

22. On January 6, 2006, while Ms Armitage and Ms. Hardiman were attempting to locate a missing magic marker, she opened the student's unlocked locker to see if the marker were there. It was not. However, a magnet that Ms. Hardiman had bought for her daughter was in the locker. She took the magnet and asked the student about it. He said he had found it when he was cleaning lockers with his father and his father had said he could keep it. He stuck to his story and Ms. Armitage accepted it but she returned the magnet to Ms. Hardiman. Soon after, when the student and Ms. Armitage were looking in his locker for his Science papers, his coat fell out and she squeezed the outside of his coat pockets to find out if they were there. Ms. Armitage emailed the student's father to tell him about the magnet and the marker. The student reported to the principal that Ms. Armitage had looked in his pants pockets for the marker. (Testimony of Rebecca Armitage).

23. The student's parent was very upset by the search incident. His understanding from his son was that he had been searched in the hallway and accused of stealing a magnet and lying about it. The parent was told by the student's therapist, Alice Day-Aparicio that Ms. Armatage was harming the student emotionally. (Testimony of parent).

24. Although Ms. Day-Aparicio believes that Ms. Armitage was impeding the student's success and causing repetitive failure, she has not observed the student at the school or interviewed any school personnel. (Testimony of Alice Day-Aparicio).

25. The school investigated the incident and the parent's allegation in a timely manner, including reviewing a videotape of the hallway. On January 11, 2006 the school concluded that the parent's allegations were unfounded. (Testimony of Kris Benway).

26. As a result of the incident, the parent met with the principal and asked him if Ms. Armitage could be replaced by another special educator. (Testimony of parent).

27. The school proposed, as a temporary solution, that Ms. Armitage continue as the case manager but that services be provided to the student by Ms. Armitage's assistant, Tim Leslie until his departure on March 7<sup>th</sup>. The parent accepted this proposal. It was the school's hope that during this time trust could be rebuilt between Ms. Armitage and the student. The parent was given the opportunity to have one of the school based clinicians meet with the student, Ms. Armitage, and Ms. Day-Aparicio to resolve existing trust issues. This counseling did not occur. (Testimony of Kris Benway; P.Ex. #23; P.Ex. #33).

28. The parent met with the superintendent, Ron Ryan, on March 8, 2006 to request that the student be given tutorial instruction outside of the school. This request was denied. Based on information from those observing Ms. Armitage's work with the student, Ms. Benway and Mr. Ryan concluded that there had been no negative impact on the student and in fact it appeared that he had worked well with Ms. Armitage. (Testimony of Kris Benway; P. Ex. #22).

29. On March 13, 2006, the student was removed from school by the parent and he did not return for the rest of the year. The student's parent met with the principal to discuss a letter from the principal denying his request to have another special educator work with the student. (Testimony of parent).

30. On March 20, 2006, the student's parents sent a letter requesting a change of placement to an out of school tutorial setting. This request was added to the agenda of the April 3, 2006 IEP meeting. The parents attended the April 3<sup>rd</sup> meeting to give the district a copy of the due process request they were filing and then left the meeting. (P.Ex. 37; Testimony of parent).

31. The student's parent called the Vermont Department of Education and requested mediation. (Testimony of parent).

32. Pursuant to his January 2006 – June 2006 IEP, the student received an

Occupational Therapy consult once a month, one to one instruction in math, small group direct instruction in reading, small group structured study hall and skill support, small group academic support for Science, Social Studies, Math and Language Arts and large group social skills training. (P.Ex.31).

33. The parent agreed with most of the services provided in the student's 2005-2006 IEPs. He was not able to specify which services he did not agree with. He did disagree with how the minutes of an IEP meeting reflected the discussion at the meeting about the role of the behavioral specialist. (Testimony of parent).

34. During the sixth and seventh grades, the student made significant progress both academically and socially. (Testimony of Rebecca Armitage).

35. The student needs a consistent program with continuity between school and home so that the same behaviors could be targeted in both places. He needs to learn to control his behavior with the primary focus being on routine and structure. (Testimony of Dr. Frank Goodwin; P.Ex. 19).

36. A Neuropsychological Evaluation of the student was conducted by Dr. Maerlender on August 25, 2005 at the Dartmouth Hitchcock Medical Center. (P.Ex. 19).

37. An IEP meeting was held on August 26, 2005. At the meeting the parent indicated that Dr. Maerlender had recommended that the student have one to one instruction in the Wilson Reading Program, five days per week for one hour a day. Even though the district had not received Dr. Maerlender's report, it agreed to provide the student with one to one instruction in the Wilson Program three days per week for his decoding deficiencies. Ms. Armitage who is trained in the Wilson Program would provide the instruction. (Testimony of Kris Benway).

38. A three year evaluation of the student was performed by the Stern Center at the request of the parent on September 27 and October 7, 2006. The Stern Center's evaluation determined that the student had mastered decoding and no longer needed the Wilson Reading Program as recommended by Dr. Maerlender. The Stern Center report recommended that the student begin using The Reading Milestone Program and the district immediately began to use Milestone. (P.Ex. #20).

39. Two members of the Stern Center staff participated in the February 10, 2006 IEP meeting by telephone to discuss the IEP contents. The Stern Center felt that the

services for the student provided a “good balance of direct instruction and generalization with support in the regular education classroom.” The Stern Center did not criticize anything in the IEP. (P.Ex. #23; Testimony of Kris Benway).

40. The parent agreed with most of the services called for in the January 9, 2006 IEP. However, he complained that the student’s IEP did not include hands on projects and the use of a computer and a QuickPad. (Testimony of parent).

41. The occupational therapist who had evaluated the student told the IEP team that because he could only type approximately one word per minute, a QuickPad would not be an effective accommodation for him. The IEP team did, however, agree to revisit the use of a QuickPad a later time. (Testimony of Kris Benway).

42. Tracy Hardiman was the paraprofessional working with the student in March of 2006 when he left school. Ms. Hardiman had a very good relationship with the student. She could successfully refocus him when he was distracted. She could reengage him with a look or a hand motion. (Testimony of Tim Leslie; Testimony of Tracy Hardiman).

43. During the 2005-2006 school year, the student’s classroom participation improved significantly. In Language Arts, the student, participated appropriately in the classroom work. He was able to stay on task to such a degree that the amount of support provided by Ms. Hardiman was in some classes reduced to a minimum. He was able to interact spontaneously and appropriately with peers and he sometimes volunteered answers to questions raised by the teacher. (Testimony of DeBonis; Testimony Of Tracy Hardiman; Testimony of Shona Marsten; Testimony of Rebecca Armitage).

44. In December of 2005, as the result of a recommendation in the Stern Center Evaluation, Kris Benway contacted Shona Marsten, a behavioral consultant, to do a functional behavioral assessment of the student. Ms. Marsten observed him for 3 hours in various classrooms on January 17, 2006 and again on February 2, 2006 for 5.5 hours in Math, English, lunch, study hall and media center. Ms. Marsten also attended an IEP meeting on February 10, 2006. (Testimony of Shona Marsten).

45. Ms. Marsten’s behavioral assessment would include examining the student’s distractibility, attention to instruction, impulsivity and behavior that has resulted in detentions. (Testimony of Shona Marsten).

46. Ms. Marsten worked with Ms. Armitage on collecting data on the student’s

performance during the day for the purpose of creating a behavior plan for him. Although Ms. Armitage began collecting data, the process ended when the student was removed from School in March of 2006 and a behavior plan was never drafted. (Testimony of Shona Marsten).

47. Although Ms. Marsten is a behavioral consultant her work is not limited to problem behaviors. She also looks at teaching and learning procedures and tracking performance over time. (Testimony of Shona Marston).

48. In addition to working with the school team, Ms. Marsten would make home visits and work with the family to develop strategies and procedures for issues that arise at home. Before the student left school, Ms. Marsten had spoken with the student's parents twice, once by phone and once in person. (Testimony of Ms. Marsten.)

49. Although there are issues of task completion and distractibility, the student is able to access education through his current education program. He is engaged and participates actively in the educational process. (Testimony of Shona Marsten).

50. If Ms. Marsten were able to resume her work with the student, she would continue to work on establishing a data base for the functional assessment and work with the staff on prevention strategies. She would look at the learning/teaching procedures in areas such as math, increase his access to a social skills curriculum, develop monitoring procedures and other reinforcement procedures that would provide incentives and develop alternative discipline procedures. (Testimony of Shona Marsten).

51. There is nothing in Dr. Goodkin's psychological evaluation of the student or the Stern Center Evaluation or the Dr. Mearlender's Neuropsychological Evaluation to indicate that the student's needs require an alternative to a regular public education placement. (Testimony of Dr. Frank Goodkin).

52. Because of the student's low to low average abilities as well as attention difficulties, "he is unlikely to achieve grade level academic expectations," (P.Ex. #20).

53. The parents believe that the student will not succeed at the district's middle school. They believe that he will not be working with people he trusts or feels comfortable with and that the school will not provide him with the services he needs. Their belief is based on what they perceive as the lack of trust between the school and the parents and the years that have passed without the student making sufficient educational



progress. (Testimony of parent).

## DISCUSSION

The student's 2005-2006 seventh grade school year was covered by three IEPs. The relevant duration of the first IEP is from August 26, 2005 to October 29, 2005. The second IEP was an amendment extending the dates of the goals and objectives. The duration of the third IEP is from January 9, 2006 to June 15, 2006 and August 25, 2006 to January 9, 2007. The parents contend that these IEPs are inappropriate.

In their due process request, the parents state that the student's disabilities may have been incorrectly identified and/or that he may have a disability that has not been identified. If he is on the Autism Spectrum or has a specific learning disability or Traumatic Brain Injury (hereafter "TBI"), the parents argue, his disability has not been identified correctly and, consequently, his IEP is not appropriate. The only evidence presented at the hearing on this issue was the testimony of the student's therapist, Alice Day-Aparicio and the Stern Center Evaluation.

During her testimony, Ms. Day-Aparicio discussed the possibility of the student suffering from TBI but admitted that she was not qualified to make such a diagnosis. The evidence contained in the Stern Center Report was that the student's profile does not demonstrate a specific learning disability. There was no expert testimony or other evidence to give credence to the contention that the student has a specific learning disability, TBI or was on the Autism Spectrum. Based on evaluations done over the past several years the district has identified his's disabilities as ADHA (Other Health Impaired) and Emotional Disturbance. No evidence was presented at the Hearing to support the contention that the district has incorrectly identified his disabilities or that it has failed to find another existing disability.

The parents argue that the IEP is inappropriate because he has not made sufficient progress, illustrated by the fact that the gaps between his grade level and his reading and math performance levels have increased. The parents contend, that although the student's progress reports state that he is making progress, he is still reading at a second to third grade level

It is difficult to determine exactly what the student's reading or math grade level is on any given day because of the variability in his academic skills, his attention issues and his frame of mind, among other things. It is, also, difficult for the parents to understand why he could master something in one grade and then not master what appeared to be the same thing in the next grade. When the parents asked questions, the answers given by the school did not always make sense to them.

It appears from the special educator's testimony as well as test results that the student has been making adequate progress in Reading and Math during his sixth and seventh grade years. His progress, however, is slow and it is likely that he will never reach grade level due to his low cognitive ability and attention problems. Whether or not the district has been aware of the parents' lack of understanding about the rate of the student's progress or increasing gap between his grade and level of performance, is not clear. However, it is clear that the district has not been successful in having the parents understand the student's limitations and achievements.

The parents desire to have the student placed in another educational setting appears to be based on their lack of confidence and trust in the student's special educator, Rebecca Armitage, as well as other school personnel. The incident involving the marker and magnet resulted in the parents requesting that Ms. Armitage no longer provide services to their son. A temporary agreement was reached and the district offered an opportunity for the parties to rebuild trust by meeting with a school clinician. The parents did not respond to the district. It is not clear how much of an effort the district made to encourage the parents resolve the matter. After the student was withdrawn from school, the parents requested mediation but it never occurred.

No credible evidence was presented at the Hearing that Ms. Armitage had behaved improperly during the marker incident. There was evidence, however, that after the incident, the student worked well in the Resource Room with Ms. Armitage present. The weight of Ms. Day-Aparicio's testimony that Ms. Armitage's work with the student was impeding his success was diminished by the fact that she had never observed them working together nor had she spoken to Ms. Armitage. This evidence does not support the parents' contention that Ms. Armitage was causing the student distress, harm, or failure, nor does it support his removal from her class and the school.

The district recognizes that as a result of his emotional disturbance the student exhibits inappropriate behavior and has difficulty maintaining relationships. It has sought the assistance of a behavioral specialist, Shona Marsten, to among other things, develop a behavior plan, examine teaching/learning procedures and develop prevention strategies. On her return, Ms. Marsten would work with both the school and the parents. Ms. Marsten's involvement with the student, the school and the family will be vital to the success of the student's return to school.

### CONCLUSION

This is not a case that requires the application of legal requirements or standards. It is not a case involving noncompliance with the law. The parents' have failed to demonstrate that the student's January 9, 2006 to January 9, 2007 IEP and the district's middle school placement are inappropriate for him. The evidence establishes that the student's IEP is appropriate and his placement is also appropriate. At the root of this controversy between the district and the parents is a lack of understanding, a failure to communicate and a failure to build trust. Assigning blame for these failures, although possible, would not be productive.

The parents, by adopting the student and demonstrating an extraordinary level of care and concern for his well being and development, have given him a chance to succeed at life. Their task cannot be easy and it is one that many would not even contemplate. But whether he succeeds also depends on the school. It must do more than merely comply with the law. In a case such as this, it has an obligation to use its knowledge, experience and resources to bring about an understanding of its role and to build trust in its actions. A unified effort is required but the school has the ability to open the dialogue and steer the course of this endeavor in the direction of success.

### ORDER

A. The student shall return to the district's middle school for the opening of class in August of 2006.

B. The district shall retain a facilitator/mediator, agreed on by the parents and the district, to attend and facilitate all meetings at which the parents are present. If the parties are unable to agree on a facilitator each party shall submit a list of three candidates to the Hearing Officer and she shall select one.

C. The district and the parents shall agree on a therapist, psychologist or counselor to meet with the student, Ms. Armitage and Ms. Day Aparicio, if she is willing, as often as necessary to rebuild confidence and trust. If the parties cannot agree a list of three candidates will be submitted to the Hearing Officer who shall make a selection.

D. Arrangements shall be made for the student to work in the Resource Room with a paraprofessional under the guidance of Ms. Armitage until the transition for services to be provided by Ms. Armitage has been accomplished at the meetings described in #3 above.

E. Shona Marsten shall resume as the behavioral specialist for the student as soon as possible and shall continue until her work is accomplished.

Dated at Hartland, Vermont this 9<sup>th</sup> day of August, 2006.

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Catherine C. Stern, Esq.  
Hearing Officer  
Vt. Dept. of Education

**Parties have a right to appeal this hearing decision by filing a civil action in a federal district court or a state court of competent jurisdiction pursuant to 20 U.S.C. §1415(e) and 34 C.F.R. §300.512, which must be commenced within 90 days of the date of this decision.**